

St. John's Law Review

Volume 6
Number 1 *Volume 6, December 1931, Number 1*

Article 4

June 2014

Proposed Changes in the New York Rule Against Perpetuities

Franklin F. Russell

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Russell, Franklin F. (1931) "Proposed Changes in the New York Rule Against Perpetuities," *St. John's Law Review*. Vol. 6 : No. 1 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol6/iss1/4>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

PROPOSED CHANGES IN THE NEW YORK RULE AGAINST PERPETUITIES

IN the December, 1930, issue of the ST. JOHN'S LAW REVIEW there appeared an article by Professor Maurice Finkelstein, of St. John's College School of Law, on the New York rule against perpetuities in which he clearly set forth two propositions: (1) That in view of the fact that the present rule has been in existence for over a century, it should not be changed without careful investigation into all the facts; (2) the present rule is seriously defective, and should be changed by legislation.

Shortly after the appearance of the article, Assemblyman William L. Marcy, Jr., of Erie County, who is a graduate of Harvard Law School and a member of one of the leading law firms of Buffalo, introduced two bills—one for real property and one for personal property—which would have substantially re-instated the common law rule.¹ Companion bills were introduced in the Senate by Senator Frederick J. Slater, of Monroe County, who is a graduate of the law school of the University of Michigan. The only opposition which was offered to the bills before the Legislature took the form of a report by the Committee on State Legislation of the Association of the Bar of the City of New York, and a report of the Committee on State Legislation of the New York County Lawyers' Association. The latter organization copied the original report of the City Bar verbatim, including a reference to law school professors which the City Bar deleted from its final report, but which the County Lawyers' Association retained. The bills passed the Legislature—in the case of the Assembly, by a unanimous vote—but were vetoed by the Governor without a public hearing on April 23rd, 1931. The veto message refers to the opposition of the two bar associations.

The adverse report of the City Bar largely follows Professor Finkelstein, but also draws some conclusions from his article which were obviously unjustified, and which Profes-

¹ Ass. Intro. Nos. 888, 889; Print. Nos. 925, 926; Sen. Intro. Nos. 981, 982; Print Nos. 1060, 1061.

sor Finkelstein could not possibly have intended. Professor Finkelstein's article is not referred to in the report. The veto message quite naturally follows the arguments of the City Bar, since they were the only adverse ones presented to the Legislature. It is therefore quite accurate to say that Professor Finkelstein's article had a great effect upon the fate of the Slater-Marcy bills.

The present article is written at the suggestion and invitation of Professor Finkelstein, in order to present some further arguments for the proposed change back to the common law rule.² It should be borne in mind, of course, that this article is not to be regarded as a reply to Professor Finkelstein's article, since the writer is in entire agreement with him in his two chief points; and also agrees with him substantially in his excellent comments upon recent Court of Appeals decisions on the subject. Professor Finkelstein's article is confined almost entirely to conclusions reached from a survey of thirty cases which went to the court of last resort between 1915—the date of the last edition of Professor Gray's classic, "The Rule Against Perpetuities"—and 1930.

Of course it cannot be assumed that Professor Finkelstein approves of all of the extensions of his suggestions which were made by the Committee on State Legislation of the City Bar. Some of the considerations urged by the City Bar in opposing the change, and which probably would never have occurred to less resourceful lawyers or less imaginative students of legislation, were the following: ^{2a} I. Since 1914, only thirty-one wills involving perpetuities have been passed upon by the Court of Appeals, whereas during that period many times this number of wills have been denied probate because they were not signed at the end or because of some other technical requirement; II. The State of New York's "development and progress, as a great state, has (*sic*) taken place while it [the present rule] has been in force." III. The people of the state have become thoroughly acquainted with the present New York rule against perpetuities. IV.

² In this article "Common Law Rule" is used in contrast to the New York Statutory Rule.

^{2a} Bulletin No. 5, March 3, 1931, pp. 140-146.

The common law rule "would permit suspension during the continuance of the lives of all persons in New York City or the United States of America who happened to be in being at the death of the testator." V. There has been no "observable complaint or protest, judicial or otherwise, until the past year or so." The validity of these objections will be considered later on in this article.

It may be of interest to state that, although the Committee on State Legislation of the City Bar Association opposed the Slater-Marcy bills, the Committee on Law Reform of the same Association approved in principle the change back to the common law rule; thus affording an interesting case of conflict within the same bar association of two committees, each composed of distinguished lawyers.

The present New York rule was adopted in 1828, effective in 1830, and has remained substantially unaltered since then. It may be found almost entirely in a few statutory sections—42 to 50 inclusive of the Real Property Law and 11 of the Personal Property Law—and in some seven hundred reported cases construing those sections. The report of the 1828 Revisers which accompanied their recommendations³ states that their objects were to make the law of future estates "simple, uniform and intelligible," in order to prevent "frequent and ruinous litigation," and to shorten the common law perpetuity period, which was multiple lives and twenty-one years, plus the period of gestation. The New York rule is two lives, plus a possible minority and the period of gestation.

The two-life rule of New York has been subjected to a powerful and almost continuous attack for about half a century. Professor Gray of Harvard Law School first published his book in 1886, in which he attacked the two-life rule as being based upon the erroneous theory of suspension of alienation instead of remoteness of vesting, and as being arbitrary, unnatural, and complicated, as a result of which it has produced an enormous amount of litigation.⁴

³The report is given in FOWLER, *REAL PROPERTY* (3d ed. 1909) pp. 1277 *et seq.*

⁴GRAY, §§747 *et seq.*

Professor William F. Walsh, of New York University Law School, states in the preface of a recently published book, that he has repeated to every class of his since 1903, representing thousands of students, that, "the state of the law of perpetuities in New York is a disgrace to the bar of this state and its bar associations."^{4a}

In 1909 Judge Robert L. Fowler, formerly Surrogate of New York County, in the last edition of his work on "Real Property,"⁵ in criticising the then recent decision in the *Wilcox* case,⁶ (in which it was held that the test of remoteness of vesting applied, even if there were no suspension of alienation), stated that if this ruling were followed again by the Court of Appeals, the common law rule should be restored by the Legislature.⁷ The test of remoteness of vesting was approved in 1919 by the Court of Appeals in the case of *Walker v. Marcellus & Otisco Lake R'y*,⁸ so that since 1919 at the latest Judge Fowler may be counted among the proponents of the change.

In 1929 Judge Cuthbert W. Pound of the New York Court of Appeals, in an address on "Defective Law—Its Cause and Remedy,"^{9a} quite naturally (one might almost say necessarily) mentioned our two-life rule, and said, "The rule against perpetuities and restraints on the power of alienation makes the preparation of a will of more than elementary simplicity one of the most difficult tasks that a New York lawyer is called upon to perform." (Judge Pound might also have included trusts, as well as wills.) This language closely parallels that of Professor Gray, when he said as long ago as 1886, "In no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York";⁹ and also the language of the Revisers of 1828 in respect of the English law of that time, " * * * to draw a will or family settlement, containing future limitations, is justly esteemed in England,

^{4a} FUTURE ESTATES IN NEW YORK (1931).

⁵ FOWLER, *op. cit. supra* p. 276 *et seq.*

⁶ 194 N. Y. 288, 87 N. E. 497 (1909).

⁷ *Supra* note 3, p. 289.

⁸ 226 N. Y. 347, 123 N. E. 736 (1919).

^{9a} Address delivered before the Federation of Bar Associations of Western New York. Published in N. Y. STATE BAR ASS'N J. (Sept. 1931).

⁹ GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) §750.

one of the most arduous and responsible duties, which the most learned in the profession can be called to perform. No man in that country can be a good conveyancer, who is not also a profound lawyer. Hence have arisen the evils of which the nation is now complaining, and which their wisest statesmen are seeking to redress."¹⁰ In short, Judge Pound thinks that the present law is very complicated.

In January, 1931, Professor Richard R. B. Powell, of Columbia Law School, in an address before the annual convention of the New York State Bar Association,¹¹ expressed his dissatisfaction with the present rule, and pointed out that only three states—Michigan, Wisconsin, and Minnesota—have ever copied our rule verbatim, and the last two have already reverted to substantially the common law period; while Michigan at the present time is considering doing the same thing, although, as Professor Powell points out, two decisions of the Michigan courts have substantially avoided the outstanding evils of the two-life rule. One, *Palms v. Palms*,¹² holds that the rule does not apply to personal property, and that necessarily includes insurance trusts, which have sprung up only in the past ten years or so; the other, *Felt v. Methodist Educ. Advance*,¹³ holds that if property is tied up for the lifetime of the survivor of, say, five children, the life of the survivor is but one of the two statutory lives. Since Professor Powell delivered his address, the writer of this article has been informed by Professor Edwin C. Goddard, of the University of Michigan Law School, who is Chairman of a Committee of the Michigan State Bar Association to consider the subject, that last September the Michigan Bar Association voted unanimously to change the two-life rule to substantially the common law rule; in 1930 there was considerable opposition to the change, due perhaps to an extraordinary minority report written by a prominent title company lawyer of Detroit.¹⁴

It is unfortunate that Professor Finkelstein appeared to lay great emphasis upon the fact that only thirty cases on

¹⁰ FOWLER, *op. cit. supra* note 3 at 1277.

¹¹ N. Y. STATE BAR ASS'N J. (Feb. 1931) pp. 91-104.

¹² 68 Mich. 355, 36 N. W. 419 (1888).

¹³ 247 Mich. 168, 225 N. W. 545 (1929).

¹⁴ MICH STATE BAR J., Sept. 1930, pp. 32-43.

perpetuities went to the Court of Appeals since the last edition of Gray in 1915; for he thereby unwittingly led the City Bar Committee on Legislation into making the inaccurate statement that "wills requiring judicial interpretation in this respect are becoming fewer." One would hardly argue that the fact that comparatively few cases on prohibition have reached the United States Supreme Court proves conclusively that the Volstead Act is in all respects a colossal success. And the jurisdiction of the Court of Appeals is much more limited now than it was in Gray's time. It is also unfortunate that Professor Finkelstein continually referred to wills, and hardly mentioned trusts. In view of the recent and rapid growth of the life insurance trust, both for family and business reasons, it is probable that the volume of non-testamentary trusts exceeds the volume of testamentary trusts. Further, a great impetus was given to the custom of establishing *inter vivos* trusts by the Sixteenth Amendment,¹⁵ and by the Federal Estate Tax,¹⁶ which is of comparatively recent origin, for considerable savings in taxes may be effected by *inter vivos* trusts, at least if irrevocable. Whether this is sociologically desirable is beside the point; it is an admitted fact.

It is certainly untrue to say that litigation regarding perpetuities is decreasing. First of all, there are many cases which do not get into the printed reports. Title companies and lawyers experienced in probate work state that there are a great many titles whose validity is doubtful because of the present rule, and which require a court proceeding of some sort, *e.g.*, a partition suit, an action to construe a will, or an accounting, before it would be safe to proceed with a purchase, or a loan. Secondly, an examination of the citations in Shepard's *Classified Topical Index* for the period of 1915 to 1930, after the statute had been in effect nearly a century, reveals that there are about two hundred and seventy citations on perpetuities. *Crescit eundo*. An examination of the digests of England, Massachusetts, New Jersey, Pennsylvania, Connecticut, etc., where the common law rule prevails,

¹⁵ 16TH AMENDMENT U. S. CONSTITUTION (1913).

¹⁶ REV. ACT OF 1916, 39 Stat. 777 (1916). Now referred to as REV. ACT OF 1926 as amended and supplemented by REV. ACT OF 1928.

reveals that there is no such amount of litigation, even in proportion to the population. It should be remembered that since the present New York rule has been in effect England has been much greater both in population and in wealth than New York, and yet has had nothing like 700 cases on perpetuities. Professor Powell estimates that upwards of 80 per cent of the New York cases would have presented no litigable topic, if the permitted measurement had been, "lives in being" instead of "two lives in being."¹⁷

The advocates of the change to the common law rule emphasize not only the volume, but also the nature of the litigation engendered by the two-life rule. Professor Walsh points out that in very recent years—from 1926 to 1928—the time and energies of the Court of Appeals, of the lower courts, and of the lawyers involved, were almost criminally wasted in taking to the court of last resort four cases in which the *sole* question involved was whether *three* lives, instead of *two*, were involved—and this after the statute has been in effect about a century!¹⁸ Not even the most pronounced protagonist of the *status quo* will pretend that the provisions of the instruments involved in these four cases would have outraged public policy had they continued for all three lives. In one of these cases,¹⁹ a testator wanted to provide for his wife and his son, and he also desired to give a "foster daughter" (*i.e.*, a girl who lived with his family, but who had not been formally adopted) a life income of \$50 a month, the entire estate being worth between \$150,000 and \$200,000. A perfectly normal and reasonable will was declared wholly void by the Surrogate and a unanimous Appellate Division, solely because three lives were involved instead of two—and in the Court of Appeals one judge dissented and another judge concurred only in part in a decision modifying that of the lower courts.²⁰ Eight out of the thirteen judges—all experienced in the matter—were wrong, due to the wholly unsubstantial difference between *three* lives and *two* lives. In *In re Perkins*,²¹ a perfectly natural will,

¹⁷ POWELL, *op. cit. supra* note 11, p. 101.

¹⁸ WALSH, *op. cit. supra* note 4, pp. 207-209.

¹⁹ Matter of Gallien, 247 N. Y. 195, 160 N. E. 8 (1928).

²⁰ *Ibid.* Kellog, *J. dissenting*; Lehman, *J. concurring in part*.

²¹ 245 N. Y. 478, 157 N. E. 750 (1927).

in every respect reasonable, was defeated solely because *three* instead of *two* lives were involved. In *Matter of Buttner*,²² a trust was sustained after a trial and two expensive appeals, on a close point involving nothing but the difference between *two* and *three* lives. *Matter of Drury*²³ is another case of three lives which required an appeal to the Court of Appeals to establish the validity of the will, after an adverse decision in the Appellate Division.

It seems strange, therefore, to hear it urged by people who should know better that, although Gray was correct in 1915 when he said that our statute makes the drafting of trust provisions a delicate operation, causing considerable uncertainty and litigation, "nevertheless the doctrine of intended separate trusts that has come into our law since the decision of the Court of Appeals in *Matter of Wilcox*"²⁴ has so fixed and settled our rule that *experienced lawyers* now have no difficulty in making *appropriate* trust provisions in one instrument for any number of living children or grandchildren. In fact, the rule of these decisions has now become so fixed by decisions of the Court of Appeals that *careful draftsmen* of wills find no difficulty in meeting particular situations with *confidence, certainty and satisfaction*.²⁵ (Italics mine.) Unfortunately, "experienced lawyers" are not the only ones who draft wills and trusts. The judges of the higher courts are all "experienced," and they have difficulty in determining whether a trust is limited by two lives or three lives, as previously indicated. And what is meant by "appropriate" provisions? Who is to be the judge of what a testator should leave to his beneficiaries, except the testator himself? If the above language is intended to convey the impression that an "experienced lawyer" who is a "careful draftsman" can do anything "appropriate" (whatever that may mean) under the present law, because of the doctrine of separate trusts, the statement is at least misleading. If a man has a wife and four children whom he wishes to protect against their improvidence by giving them life incomes only, instead of giving them any principal, and yet desires the en-

²² 243 N. Y. 1, 152 N. E. 447 (1926).

²³ 249 N. Y. 154, 163 N. E. 133 (1928).

²⁴ *Supra* note 6.

²⁵ *Supra* note 2a.

tire income to remain for the benefit of the five beneficiaries or the survivors, the nearest thing he can do would be to set up a trust for the wife for life, and upon her death to divide the corpus into four separate trusts, and give the income on each of the four secondary trusts to each of the children for life. But upon the death of each of the four children, the separate secondary trust set up for each child must be distributed outright. If the above language is intended to create the impression that the law has been simplified since 1915, the answer is that we still have an enormous and ever-increasing amount of litigation, both reported and unreported; and that Judge Pound as recently as 1929 went on record to the contrary.²⁶ It will hardly be contended that Judge Pound is not "experienced" in such matters. The words "confidence, certainty and satisfaction," while splendidly sonorous, and while undoubtedly sincerely and earnestly believed by the Committee on State Legislation, nevertheless necessarily bring to mind the less complacent and less pompous statement in the preface of Gray, "The study and practice of the Rule against Perpetuities is indeed a constant school of modesty."

No one knows to this day why the Revisers of 1828 fixed the limit of measuring lives at two, instead of one, three, five or some other number. Professor Powell advances a theory as to this, but he says that he cannot prove it.²⁷ Professor Walsh's theory is that the number two was chosen because it is more than one and less than three—he can think of no other reason.^{27a} At the hearing on the Slater-Marcy bills last winter before the Judiciary Committee of the Assembly, one of the members of the Committee advanced the ingenious hypothesis that the Revisers wanted to limit the size of families by making it difficult to provide for more than two children and hence were really the first advocates of birth-control! The sixth Duke of Norfolk, a pious Catholic, must have turned over in his grave!

Admittedly the sole object in limiting the measuring lives to two was to shorten the common-law perpetuity

²⁶ *Supra* note 8a.

²⁷ POWELL, *op. cit. supra* note 11, p. 99.

^{27a} WALSH, *op. cit. supra* at 208.

period. The Revisers thought that the survivor of only two lives would ordinarily die much sooner than the survivor of more than two. In this they were mistaken. Their mistake was not remarkable, for in 1828 there were practically no life insurance companies, and hence mortality or actuarial tables were almost unknown, because there was no sufficient experience upon which to base any figures. On the other hand, the Revisers had before them the judgement of Lord Eldon in the *Thelluson* case,²⁸ decided about twenty years previously, in which the Chancellor pointed out that it was not the *number*, but the *quality* of the lives selected which was important; and he showed how, since the *Thelluson* case had commenced seven years previously, more than twenty members of the House of Lords had died. (Cynics might say that this shows how long it took Lord Eldon to decide cases—the accumulation of arrears in the Court of Chancery reached appalling proportions under Eldon, as Dickens pointed out, by inference, in “Bleak House,” in describing the case of *Jarndyce against Jarndyce*.) To use a modern analogy, the survivor of two healthy children will probably outlive the survivor of the thousands of members of the Grand Army of the Republic.

The present writer obtained some actuarial figures last winter in order to have some definite, concrete information for the Legislature. Without setting forth the tables in detail, the figures of various groups of persons all aged 35 (the average age) are most illuminating. The expectancy of life of the survivor of two (the limit permitted by the present law) is 38.98 years; of three, 42.47 years; of four, 44.44, and of five, 45.75 years. The majority of cases in the reports involved less than ten lives; for example, the *Thelluson* case, which created the demand for the English statute against accumulations of 1800, involved eight lives. But the survivor of ten will outlive the survivor of five by less than five years; and the survivor of fifty will outlive the survivor of twenty-five by but two years. The figures for groups of persons aged 20 and aged 50 show approximately the same results; for example, the survivor of twenty-five will outlive the survivor of ten by only five years at all three ages of 20, 35

²⁸ *Thelluson v. Woodford*, 11 Vesey 112 (1805).

and 50. In other words, the knowledge we now possess of actuarial figures, and which the Revisers did not have in 1828, shows that their attempted shortening of the perpetuity period resulted in practical futility; and we have paid a very heavy price for this theoretical curtailment in the way of an enormous amount of litigation, great uncertainty, and other evils.

There are undoubtedly many trusts now being administered in New York which have lasted eighty years or so. Many a testator or settlor has undoubtedly created a testamentary or an *inter vivos* trust for a two-year-old daughter, who lives to be eighty-five or so. In such a case, only one life would be involved; and if this hypothetical beneficiary had had half a dozen brothers and sisters, and a trust had been created for all of them under the common law rule, it undoubtedly would not have lasted much longer than the single life. A case such as this shows the disadvantage of fixing an arbitrary period, such as fifty years, as the outside limit of any trust. Many testators or settlors undoubtedly want their beneficiaries to have an income for their entire lives no matter how old they may live to be, and a fifty-year limitation might easily result in giving them the principal at a time in life when they may be totally unprepared through inexperience or old age to handle substantial sums of money.

Judge Fowler made the suggestion in 1909 that the law of England should be examined with the view of ascertaining what lessons might be available for New York from English experience.²⁹ While the present writer is far from claiming to be an expert on the English law of real property, it so happened that he did study law in England for three years, and he recently undertook the task outlined by Judge Fowler over twenty years ago. The conclusion reached was that the 1828 New York Revisers entirely misinterpreted the causes of the evils of the English land law of 1828, which were not created by the common law rule against perpetuities, but by entirely different matters, viz., the absence of anything like a land registration system, the frequent failure of solicitors to insert in wills and settlements the powers of trustees

²⁹ FOWLER, *op. cit.* *supra* note 3, p. 272.

which we today in New York usually insert (namely, the power to sell, lease, mortgage, exchange and partition real property); and finally, to the system of settlements of land which has never been popular in this state because of different social and economic conditions and ideals. In England the failure to provide for a power of sale not only removed land from commerce, but also it frequently happened that the land itself was starved of money necessary for its development and improvement, while the family would live in more or less genteel poverty. "No doubt the evil was not so great in the early nineteenth century, before the vast spread of industrialism had produced a demand for coal and other minerals, and had converted England from an agricultural to a trading community."³⁰ "The only relief was to apply for a private Act of Parliament, authorizing the trustees or life tenant to sell, exchange, partition or lease. But such acts were expensive luxuries, open only to the rich, and beyond the means of most country gentlemen of moderate means."³¹

When the modern industrial era set in, Parliament took the matter in hand, and passed a series of public Acts of Parliament which enabled settled land to be dealt with in a manner likely to enhance the prosperity of the land. Cheshire has set forth³² the details of this legislation, and it will suffice to say that, beginning with the Fines and Recoveries Act of 1833, which enabled a tenant in tail to grant leases up to 21 years, and ending with the Settled Land Acts which were passed from 1882 to 1890 (which have been substantially re-enacted in Lord Birkenhead's Acts, which took effect in 1926), England now permits settled land to be sold, mortgaged, leased and exchanged without the necessity of asking the permission of the court, under conditions which safeguard the interests of all persons entitled under the settlement. The object of these acts was to make land a marketable object notwithstanding the settlement.

In other words, the evils of the English land law of 1828 have since been removed by subsequent legislation, as

³⁰ CHESHIRE, *MODERN REAL PROPERTY* (2d ed. 1927) p. 388.

³¹ UNDERHILL, *CENTURY OF LAW REFORM*, pp. 284, 285.

³² CHESHIRE, *op. cit. supra* note 30, pp. 389, 391.

a result of which there is no danger of English real property being taken out of commerce or of the land deteriorating through inability to raise money by sale, mortgage or lease. The rule against perpetuities had nothing to do with this. So far as we in New York are concerned, experienced lawyers and careful draftsmen of wills and trusts usually insert such powers in instruments; and there is now read into every will a statutory power of sale, mortgage and lease, unless the testator expressly prohibits the exercise of the same.³³

The 1828 Revisers also decried the great hazard and expense of alienation of English real property. This was, and is, due to the fact that England has never had a land registration system at all comparable to ours. Every time land is sold, a complete re-examination of the title must be had, even if the title has been examined quite recently. And even if there have never been any trusts affecting the land, and nothing but the fee simple has ever been involved, the expense of alienation is just the same. "The great evil is not that titles are uncertain or unsafe, but that the investigation of them is difficult, tedious and costly."³⁴ Lord Birkenhead's Acts³⁵ attempt to set up a system of land registration which may help the situation. But again all this has nothing to do with perpetuities.

So far as the present writer knows, until the last year or so the problems presented by the New York rule against perpetuities have been discussed solely from the standpoint of legal history or analytical jurisprudence. Gray was an analytical jurist, as his "Nature and Sources of the Law" clearly shows; and of course, in the field of real property at least, he was a legal historian if not an historical jurist. It might be advisable to approach the situation from the standpoint of the school of sociological jurisprudence, which is undoubtedly at present the dominant American school of jurisprudential thought, since it includes among its members Justices Holmes and Brandeis of the United States Supreme Court, Chief Judge Cardozo and Judge Pound of the New

³³ N. Y. DEC. EST. L., L. 1909, c. 18, §13.

³⁴ POLLOCK, THE LAND LAWS (1883) p. 164 *et seq.*

³⁵ LORD BIRKENHEAD'S ACTS (in effect Jan. 1926).

York Court of Appeals, and Dean Pound of Harvard Law School.

Without intending to turn this paper into an article on sociological jurisprudence, a few of the tenets of the sociological school may be set forth briefly. The underlying principle is that the law should be brought into conformity with present sociological and economic needs. This end is to be achieved in several ways. There should be a sociological study of legal history. Judges should be trained in sociology. A study should be made of the practical working of the law and of ways in which the law can be made effective. The chief aim of the law should be, not a man's legal rights, but his social and economic needs. Old doctrines of the law should be re-examined to see if they meet modern economic and sociological needs.

In 1828, when the present New York rule against perpetuities was enacted, the great bulk of the wealth of the state was in real estate or in personal property closely connected with real estate, such as cattle. The first railroads and life insurance companies were about starting their activities.^{35a} There were no public utilities, great manufacturing corporations or vast agglomerations of stocks and bonds such as we now have. The amount of land is always necessarily limited; and if it had been taken out of commerce by some legal limitation for an undue period of time, the situation undoubtedly would have been serious; and since land in those days held most of the capital of the state, it also necessarily supplied most of the income. We may also properly infer that the skill of the New York legal profession had not attained the standard in such matters that it has today; for if, as we have seen, the English conveyancers and solicitors of 1828 did not insert powers of sale, lease and mortgage in wills and deeds, with centuries of experience in preparing family settlements behind them, it is logical to assume that the majority of New York lawyers did not do so. Further, the real estate holding company which is very common today was practically if not

^{35a} The first railroad, the Baltimore & Ohio, started activities about 1828. The first life insurance companies, the Mutual Life of New York and the New England Mutual, commenced in 1843; each claims to be the oldest company in the United States.

entirely unknown in 1828; and the holding company facilitates the transfer of real estate.

Again, in 1828 the type of real estate which was most apt to be tied up was the family residence, usually for sentimental reasons. But in large cities family mansions have been, and are being demolished to make way for office building, hotels and apartment houses. The high and ever-mounting real estate taxes make the retention of such mansions economically unwise or impossible. In one recent year but one new residence was constructed in the entire county of New York. And since the last census shows a continuance of the trend toward the cities, it is probable that the future holds a promise of more apartments and less homes. The situation is similar in the country and in the suburbs. Large estates are being given up, owing to high taxes and the difficulty of getting or keeping servants, and are being converted into country clubs, or schools, or are being subdivided for real estate developments.

Let us now examine the practical operation of the New York rule. We have already seen that it has frustrated the wishes of a great many testators and settlors and has caused hundreds if not thousands of law suits. Necessarily it has cast doubt upon many titles to real estate, and to that extent has taken realty out of the market until the courts have settled the matter. The present rule results in many testators and settlors making dispositions of their property which they would not like to make; and in preventing them from making perfectly normal and reasonable dispositions of their property. As Professor Powell says,³⁶ "Only a small percentage of wills involve invalid provisions and only some of these get into litigation. Does this mean that the present rules are normally satisfactory? Not at all. It means merely that lawyers tell clients the limitations placed upon their dispositions by these rules and force the wills drawn to conform thereto. The mould is fixed. Be poured into the waiting form or make no will. This suggests that of which I am firmly convinced, namely, that our present rules prevent persons who have wealth subject to their dispositions from mak-

³⁶ POWELL, *op. cit. supra* note 11, p. 102.

ing those dispositions which they would normally and reasonably desire to make."

There is another and possibly more important aspect of the practical working of the New York rule. Rather than submit to making dispositions of their property which they do not choose to make, men will go elsewhere to set up trusts and in some cases make their wills. The present rule unquestionably and admittedly drives or keeps out of New York a great deal of business and complicates the development of life insurance. As previously stated, life insurance was practically unknown in 1828. Life insurance companies have spent millions in trying to educate their policy-holders to the effect that it is usually unwise for a man to leave his widow or daughter a substantial sum of money outright, for money so left usually lasts about seven years only; and probably three-quarters of all life insurance is taken out for women. For many years counsel for life insurance companies have been in grave doubt as to whether or not the beneficiary option clauses of the life insurance contract are governed by the rule against perpetuities. Because of this doubt, life insurance companies "play safe" and have always insisted on such clauses complying with the rule; therefore there are no adjudications on the point; and the insured has to comply with the rule, regardless of his wishes. New York life insurance companies naturally like their contracts to be governed by New York law, since this is the body of law with which they are most familiar. Under the rules of conflict of laws, a policy is governed by the law of the place where it is delivered.³⁷ This is usually the place where the insured lives or has an office. Probably most New York prospects of life insurance companies both live and work in New York, and New York law therefore must govern. If a prospect is a commuter who works in New York and lives in Connecticut or New Jersey, he will undoubtedly be advised to have the policy delivered to him at his residence, if he has three or more beneficiaries and wishes the insurer to retain the proceeds of the policy.

³⁷ *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 32 Sup. Ct. 220 (1911).

The situation is similar in respect of life insurance trusts, which are a development of the last decade only, and of course were entirely unknown in 1828. The life insurance trust undoubtedly performs a valuable economic and social need, or it would not have grown up so swiftly. It is valuable not only for family arrangements, but also for business reasons, especially to purchase the interest of a deceased partner or a deceased officer of a close corporation. The New York two-life rule unnecessarily complicates or makes impracticable the creation of a business life insurance trust if the lives involved number more than two. In the case of business life insurance, the result is to put money into active business enterprises at a time when it is most needed, namely upon the death of a substantial money-earner. Any legal rule which prevents money from being put into active business enterprises through life insurance must be economically unsound.

All the neighboring states have the common law rule against perpetuities—so have most of the others. It is a simple matter for a man to set up a trust in Connecticut or New Jersey, where there are strong, powerful and aggressive trust companies which openly advertise for New York business—and with considerable success, according to some of the letters which the introducers of the bills in the Legislature received last winter. The best asset of foreign trust companies in contiguous states is the New York rule against perpetuities. They must indeed be grateful to any New Yorkers who oppose changing it.

The loss of business is not confined to life insurance. Many a man of means, who has more than two dependents, is in a position to make his legal domicile either in New York or in some other state, for example, the state where he has his summer home. On the other hand, it is a mistake to imply, as the Governor did in his veto message, that the only persons interested in changing the rule are "owners of large estates."³⁸ Such fortunate people are substantially unaffected by the present New York rule. Usually they can select their own domicile. They can set up separate trusts in New York or elsewhere during their lifetime for each one of

³⁸ See Veto Message.

several dependents. Indeed, there may be certain advantages from the standpoint of avoiding taxes in adopting this procedure. The chief difficulty of the present rule occurs in the case of a man who has about \$100,000 and four or five dependents. The advent of the life insurance trust has made estates of this size comparatively common, since the average man can carry life insurance at an annual premium of about two per cent of the face amount of the policy.

As a result of this serious loss of business by New York lawyers, trustees, executors, life insurance companies, life insurance agents and others, the State of New York loses an immense sum of money in taxes, which now goes to neighboring states which have the common law rule. We are in a situation similar to that which we had many years ago when high transfer taxes drove a lot of money and property outside of the state.

Finally, we must consider the workings of the common law rule, which it is proposed New York adopt. The rule was first laid down in 1681 in England, in the *Duke of Norfolk's* case. It has worked well in England and in most parts of the civilized world which have the common law, such as Canada and Australia, as well as in the vast majority of American states. There is nothing in the economic, social or historical situation of New Jersey, Pennsylvania, Massachusetts or Connecticut which justifies the drawing of any real distinction between New York and its neighbors. Other states have never hesitated to copy New York statutes which are really good, such as the Workmen's Compensation Act and some tax statutes. What chance would there be of persuading the Pennsylvania or New Jersey legislature to adopt the two-life rule? Our neighbors have watched the operation of our statute for over a century, and have been singularly unimpressed, with the exception of Connecticut, which once adopted a modification of our rule, but has long since returned to the old common law rule.³⁹ So far as is known by the present writer, there has never been any demand in neighboring states for a change in the common law rule, except Connecticut. The City Bar Committee has advanced the novel and astounding proposition that New York has grown to

³⁹ GRAY, *op. cit. supra*, at §739.

greatness *while* the two-life rule has been in existence. The use of the word "while" technically saves the Committee on State Legislation from committing the fallacy of *post hoc ergo propter hoc*; but the mere fact that they mention the subject at all shows that they wish to give an impression, however vague, that the economic history of the Empire State must be rewritten in order to give due credit to the two-life rule against perpetuities. One could with equal logic substitute for the two-life rule against perpetuities the Republican Party, Tammany Hall or the tariff. The chief trouble with this statement, however, is that the growth and development of the country as a whole, in which New York has necessarily shared, occurred *while* the common-law rule against perpetuities was generally in effect.

The Slater-Marcy bills were approved by prominent lawyers, bar associations, title companies, real estate boards, trust companies, life insurance companies, and others, representing all parts of the state. Those whose experience brings them into closest contact with the present law are the most outspoken in their denunciation of it. It will be noted that the City Bar Committee did not say outright that the subject has not been considered in all its phases since 1828—it merely hazarded a guess to that effect, prefacing its remarks by the vague, "It is not believed that" the subject has been carefully examined.

Most of the objections urged by the opponents of the change have been answered above. Some remain. To argue that the change should not be made because many wills are not signed at the end is about as logical as to contend that if a man with chronic heart disease should break a leg, the limb should not be set because he would still have heart disease. The claim that the people of the state have become "thoroughly acquainted" with the present New York rule against perpetuities doesn't seem to require any answer, except the obvious one that the subject is so technical that probably the great majority of lawyers, let alone laymen, are unfamiliar with it. To say that under the common law rule "lives in being" would permit property to be tied up for the lifetime of all persons living in New York City or the United States at the death of the testator

is erroneous; the number of lives chosen must be sufficiently small so that the death of the survivor can be proven by reasonable evidence.⁴⁰ To say that there has been "no observable complaint or protest, judicial or otherwise, until the past year or so" is quite a slap at Professor Gray and Harvard Law School, at Professor Walsh and at Judge Fowler, whose objections to the present rule date respectively at least from 1886, 1903, and 1919. It is difficult to imagine just what was intended by the word "observable," since Professor Gray and Judge Fowler set forth their views in books which are widely read by the bar in general and undoubtedly by the majority, if not all, of the members of the City Bar Committee. It is difficult to see how the change back to a rule which dates from 1681 in its most important phases can be called "radical"; if anything, the change would be the very opposite, if it really amounted to a substantial difference in the perpetuity period. But the mortality tables demonstrate that property would not be tied up to any substantially greater extent, that the change would be very slight in point of time since, under the doctrine of separate trusts, part of the corpus of the original trust fund can now be tied up for longer than two lives in being. To urge that the measuring lives should be those of persons interested in the property ignores the fact that it would be easy to evade such a rule by making a gift of an insignificant sum, such as a dollar a year, to a large number of individuals, even if the testator or settlor did not examine the mortality tables to learn therefrom that little is gained by the addition of more measuring lives, provided they all are in being. To urge that lawyers will have to learn all over again how to draw wills and trusts ignores the fact that instruments drawn up to conform with the present law will be perfectly valid under the proposed change, and that law schools all teach the common law rule. Drawing up instruments under the common law rule, compared to drawing them under the present law, would be as delightful as riding in a saddle after one has spent many weary and painful hours learning to ride bare-back.

⁴⁰ GRAY, *op. cit. supra* note 9, §§216-219.

With a single exception, the present writer agrees with the changes recently suggested by Professor Walsh.⁴¹ The exception is to the suggestion that only two lives of strangers to the gift may be taken as measuring the duration of the limitation; the reasons for not following Professor Walsh in this respect are set forth in the last paragraph. With this change, the new law would be as follows:

Section 42 of the Real Property Law would have a different heading and would be as follows:

SECTION 42. *The Rule Against Perpetuities Caused By Future Estates.* Every future contingent estate shall be void in its creation which is not certain to vest, in interest, if at all, within the lives of persons in being at the creation of the estate and twenty-one years in addition, or within the term of twenty-one years if no lives are involved as measuring the period. Any periods of gestation that may be involved in the vesting of any such future estate shall be added to the period permitted by this section.

Sections 43 to 47 inclusive should be repealed in their entirety, without substitution.⁴² The latter part of section 49, beginning, "so that the absolute ownership of a term" to the end of the section should be repealed. The latter clause of section 50, "on a contingency" to the end of the section should be repealed.

But to remove all doubt the following words should be added to section 103: "The period during which the inalienable trusts herein provided for may be created to continue shall be the same in all respects as the period within which future contingent estates must vest in interest."

It will be noted that the test is remoteness of vesting, and not suspension of the absolute power of alienation. It is the writer's belief that it would not be necessary to make any change in section 96, subdivision 3 or section 103 of the

⁴¹ WALSHE, *op. cit. supra* note 4, §35. The words "in interest" are not found in Professor Walsh's book, but he has informed the present writer verbally that the addition of these two words would avoid any doubt as to whether the estate had to vest "in interest" or "in possession."

⁴² N. Y. REAL PROPERTY LAW, L. 1909, c. 52.

Real Property Law, since it has been held that the provisions of section 42 apply to these sections, and the only change would be in the period.⁴³ It will be recalled that the test of remoteness meets the objection of Professor Gray to the present New York rule,⁴⁴ and also meets Judge Fowler's objections to the *Wilcox* case.⁴⁵ The subject of perpetuities is too important to omit entirely from the statute book, and hence repeal alone is inadvisable. Another reason is: it might be contended that the English rule was not established in final form until 1833, when the House of Lords handed down their judgement in *Cadell v. Palmer*.⁴⁶ This in turn would raise the perplexing question of the effect of a judicial decision; is new law made, or is the court merely declaring what always has been the law? There is an abundance of authority on the common law rule, so there would be no need of new judicial interpretation; and, as previously stated, Professor Powell estimates that eighty per cent of the New York cases would have presented no litigable topic had our rule been "lives in being" instead of two lives.

Sections 100, 101 and 102 of the Real Property Law should be repealed. In section 178, the words "absolute power of alienation" should be changed to "vesting of future contingent interests."⁴⁷

Sections 11 and 15 of the Personal Property Law should be made to conform to the Real Property Law.⁴⁸

To sum up: Professor Finkelstein was quite correct in suggesting that the subject should be carefully studied. During the past year his suggestion has been carried out by persons and groups most seriously affected by the proposed change. It is difficult to see why life insurance companies, title companies, real estate boards, practicing lawyers, law school professors, etc., need more than a year to make up their minds on a subject with which they have been entirely familiar for a long time. Professor Finkelstein is also correct in his criticisms of the present law, and in his demand

⁴³ *Coster v. Lorillard*, 14 Wend. 265 (N. Y. 1835).

⁴⁴ GRAY, *op. cit. supra*, at §748(e).

⁴⁵ FOWLER, *op. cit. supra* note 3, pp. 276, 289.

⁴⁶ 1 Cl. & Fin. 372 (1833).

⁴⁷ See changes suggested by Professor Horace E. Whiteside, *Suspension of the Power of Alienation in New York* (1927-28) 13 CORN. L. Q. 31, 167.

⁴⁸ N. Y. PERSONAL PROPERTY LAW, L. 1909, c. 45.

for statutory modification. Gray's objections, first made in 1886, are just as valid today, and just as unanswerable; and they alone would justify the change. The actuarial figures demolish the sole argument for the 1828 revision, namely, the alleged substantial curtailment of the common law period. Changed legal practices, such as the insertion of powers of sale, mortgage, lease, etc., in legal instruments make the present law both obsolete and mischievous; and changed economic and social conditions, including the growth of life insurance, insurance trusts and the change in the bulk of the wealth of the state from realty to personalty, the loss of business and taxes to neighboring common law states, all make the change imperatively and immediately necessary from the standpoint of analytical and sociological jurisprudence. The Governor committed the subject to the Commission to Investigate Defects in the Laws of Estates for study and recommendation, and the members of the Commission now have a splendid opportunity to increase still further their great prestige as law reformers by ridding the law of our unsound and outworn rule against perpetuities.

FRANKLIN F. RUSSELL.

New York City.